IN THE HIGH COURT OF BOMBAY AT GOA.

FIRST APPEAL NO. 43 OF 1997.

1. Syed Hussain Assraf
   residing at Shashi Sadan,
   Vaddem, Vasco-da-Gama,
   Goa.

2. M/s. Goa Ship Repairs,
   A Partnership Firm,
   registered under the Indian Partnership
   Act, 1932 now dissolved and having itself
   place of business at Vasco-da-Gama. .....Appellants.

Versus

1. Dena Bank,
   A Govt. of India Undertaking,
   having its Head Office at
   Horniman Circle Fort,
   Bombay 400 023.

2. Kamalakar Madhavrao Pathare.

3. Smt. Charulata K. Pathare,
   wife of Kamalakar Pathare,
   both residing at Sheriar Building,
   A-Block, 5th Floor, Babula Tank Road,
   Byculla, Bombay – 8.

4. Smt. Salme Lawrence Pinto
   alias Mohammed Jamal Ashraf,
   r/o Sheriar Building, 5th Floor,
   Babula Tank Road, Opp. J. J. Hospital,
   Gate No. 4, Bombay – 9.

5. Mrs. Magdalene Pinto,
   r/o 22, Apurva Chembur Naka,
   Chembur, Bombay – 400 071.

6. Raj Joseph Pinto,
   minor through his mother and
   natural guardian Mrs. Magdalene Pinto.

7. Prakash Joseph Pinto,
   minor through his mother and
   natural guardian Mrs. Magdalene Pinto,
   both residents of 22, Apurva Chembur Naka,
   Chembur, Bombay – 400 071. .....Respondents.

Shri R. G. Ramani, Advocate for the Appellants.

Shri A. R. Kantak, Advocate for the Respondent No. 1.

CORAM : B. H. MARLAPALLE, J.
DATE OF RESERVING THE JUDGMENT : 30TH SEPTEMBER, 2004.
DATE OF PRONOUNCING THE JUDGMENT : 18TH OCTOBER, 2004.

ORAL JUDGMENT (PER MARLAPALLE, J.) :

1. This Appeal arises from the decree passed by the Learned Civil Judge, Senior Division at Vasco in Special Civil Suit No. 31 of 1976 on 31.10.1996. The suit was partly decreed and the defendants No. 1, 2, 3 & 5 were directed to pay jointly to the plaintiff the sum of Rs. 3,66,203.40/- with interest thereon at the rate of 6% per annum from the date of the suit till payment or realisation.

2. It was the case of the Plaintiff Nationalised Bank that defendant No.1 (since absconding) was its employee in its Head Office at Mumbai and defendant No. 2 was his wife, whereas defendants No. 3 & 4 are the residents of Goa and were carrying on a partnership business in the name and style of Messrs. Goa Ship Repairs (defendant No. 5) with defendant No. 2 as the 3rd partner. It was alleged that defendant No. 2 was merely a benami partner in place of defendant No. 1 and in fact it was at the instance of the defendant No. 1 that she was described as a partner of defendant No. 5 partnership firm which was registered under the Indian Partnership Act, 1932. Defendant No. 2 did not have any independent source of income. Defendant No. 1 had joined the services of the Bank in 1951 as a clerk and came to be promoted as an officer in 1964 and till 4th October, 1975 he was attached to the Clearing Department at its Head Office. He was posted as an officer attached to the Clearing Department right from 1964 to 4th October, 1975 and he entered into criminal conspiracies to defraud the Bank and to embezzle and misappropriate its funds in access of Rs. 15,00,000/-. The modus operandi employed by the defendant No. 1 in defrauding the Bank was in short through various Bank Accounts he had opened in his individual names or jointly with defendants No. 2 & 3. He got issued from time to time cheques drawn on such bank accounts opened at the branches of the Plaintiff Bank and the cheques were thereafter presented for encashment through the said bank accounts. When the

said cheques were received from the branches or from other banks at the Clearing Department of the Plaintiffs at their Head Office, the defendant No. 1 either destroyed or removed such cheques and failed to show receipt of the same in the run-up to be furnished in the said office as well as in other branches. As a result of this modus operandi, the accounts on which such cheques were drawn could not be debited and they would remain in dark. At the same time, defendant No. 1 would ensure that other banks or branches of the Plaintiffs Bank presenting such fictitious cheques were given credit for the amounts thereof without corresponding debit entries made in the accounts on which the said cheques were drawn. Thus the defendant No. 1 would cause wrongful gains to the holders of the bank accounts and corresponding losses to the Plaintiff Bank.

3. The aforesaid fact came to light sometime towards the end of September, 1975 and thereafter the plaintiffs caused further enquiries and to its surprise it learned that the defendant No. 1 had roped in a subordinate by name J. S. Katkar who had encashed cheques drawn on various branches of the plaintiffs to the extent of about Rs. 1,50,000/- during the years 1972-1975. A police complaint came to be registered against the said Katkar who was arrested and during the course of investigation by the police, he had purportedly disclosed that he had merely lent his name for opening and operation of the bank account by defendant No. 1. The investigation was

subsequently handed over to the Central Bureau of Investigation, Mumabi and in the meantime it learned that defendant No. 1 having come to know the arrest of Katkar, absconded and / or failed to report to duty as from 3rd October, 1975. In the course of the enquiries by the bank, it came to light that the defendant No. 1 had opened different accounts jointly with defendant No.2 and / or defendant No. 3 i.e. S.B. A/c No. 5567 at the Dadar Branch, S.B. A/c No. 110 at the Umerkhadi Branch, A/c No. NSH/1759 at the Head Office, S.B. A/c No. 18361 at the Head Office, Current A/c No. 14407 at the Head Office in the name of M/s. Johnson Structurals with defendant No. 3 as another partner. The Defendants No. 1, 2, & 3 deposited in the said bank accounts false cheques and obtained false credits to the tune of Rs. 3,66,203.40 and the said sum was utilized for the business of defendant No.5 with the assistance of defendant No. 4. During the course of investigation it was further realised as per the plaintiffs that defendant No. 2 had invested in the business of defendant No. 5 an amount of Rs. 1,00,000/- while defendant No. 3 had lent an advance to defendant No. 5 a sum of Rs. 1,00,000/- over and above his investment in the said firm. As per the plaintiffs, the defendant No. 5 has started with capital fraudulently obtained by defendants No. 1, 2, & 3 and these funds were actually from the financial loss caused to it by the defendant No. 1 by following the above stated modus operandi. It was further contended that during the course of investigation by the C.B.I. it was revealed that a sum of Rs. 2,18,007/- was yet to be

recovered by defendant No. 5 from various parties for whom the firm did the work of ship repairs and thus the Plaintiffs were put to a total loss of Rs. 3,66,203.40.

4. Written statement was filed by defendant No. 4 and the same was adopted by defendant No. 5 which was represented by defendant No. 4. No other defendants appeared and contested the suit. The defendant No. 4 pleaded that he was a Law Graduate and enrolled as an Advocate with the Bar Council of Maharashtra. In or about 1973, he came in contact with defendant No. 3 who persuaded him in training in the business of ship repairs which was being conducted by the said defendant No. 3. In January 1975 the defendant No. 5 firm was constituted with defendant No. 3 contributing 25% share of the business and assets and defendant No. 2 being 2nd partner whereas defendant No. 4 would be the 3rd partner and he would be entitled to draw a sum of Rs. 1500/- per month by way of expenses. The total capital of the firm was Rs. 30,000/- which was paid by the defendant No. 3. The defendant No. 2 never attended the business and the defendant No. 3 was unwell and was largely confined either to his own residence or used to go to Bombay for medical advice and therefore the business of defendant No. 5 was attented by defendant No. 4. He was not aware and had no knowledge of the charges which were levelled by the Plaintiff Bank against defendants No. 1, 2 & 3. He had entered into partnership in good faith and in a bonafide belief

that he was dealing with persons of integrity. He also had no knowledge and was not aware of bank accounts maintained by defendants No. 1, 2 & 3. He denied the claim of Plaintiff Bank and also the allegation that defendant No. 2 was a benami for defendant No. 1 and he further pleaded that defendant No. 1 had no concern what so ever with defendant No. 5 firm.

5. The Plaintiff Bank had given up its claim against defendant No. 4 only in respect of prayer (a) of the plaint, which seeks to recover from all the defendants an amount of Rs. 3,66,203.40 together with interest thereon at the rate of 6% per annum and the defendant No. 5 firm was closed. The suit thus remained against defendants No. 1, 2 & 3 and defendant No. 5 was represented by defendant No. 4. The plaintiffs have examined in all twelve witnesses in support of their case, whereas the defendants No. 4 & 5 did not examine any witness in their defence. P.W.11 – Shri Labhashankar S. Mehta had stated in his deposition that when the C.B.I. carried out the investigation, the bank came to know that the defendant No.1 misappropriated about Rs. 45 lakhs and out of the said amount, substantial amount was invested to carry out the business of defendant No. 5 firm. He also stated that the bank sought to recover an amount of Rs. 3,66,203.40 in addition to an amount of Rs. 2,18,000/- as per Exhibit - C towards the investments made in defendant No. 5 firm. P.W.3 – Shri Ramalingan Vishwanathan gave the details of various bank accounts

opened and operated in the name of defendants No. 1, 2 & 3 with various branches of the Plaintiff Bank and these were : S.B. A/c No.18361 at the Head Office, S.B. A/c No.4835 with Panaji Branch, S.B. A/c No.5660 with Sion Branch in the name of defendant No. 3, Joint S.B. A/c No.5567 in the name of defendants No. 1 & 2 in addition to S.B. A/c No.1759 with the Head Office, A/c No.28538 with the Syndicate Bank, Fort Mumbai in the name of defendant No.1, S.B. A/c No.2355 with Seribazar Branch in the name of the brother and sister-in-law of the defendant No.1, S.B. A/c No.2818 with Dena Bank, Dadar Branch in the name of the said relations which were subsequently transferred to the Mahim Branch under new A/c No.1570, S.B. A/c No.8407 with the Head Office in the name of Divakar Madhav Pathare, Prabhakar Madhav Pathare and Kamal Madhav Pathare, S.B. A/c No.1364 with Worli Branch in the name of Anant Atmaram Timble, the brother-in-law of the defendant No.1 and his mother Manoramabai Timble, A/c No.7198 in the name of the defendant No.1 and two others with Dadar Branch, A/c No.7213 in the name of defendant No.1 and one Mina Moreshwar Tharthare with Dadar Branch, A/c No.2307 with Dadar Branch in the name of Kashinath B. Yadav, A/c. No.24313 with Dadar Branch jointly by the defendant No.1 and Shri Shankar Kanderao Devere, A/c No.7824 in the name of Divakar Pathare with Khar Branch, A/c No.12938 in the name of Chandrashekar Adur, A/c No.3309 in the name of Pramod Kumar P. Chhawkar and the defendant No.1, A/c No.2233 in the name

of Master Parag Divakar Pathare and Mrs. Anuradha D. Pathare with Mahim Branch. The said witness also explained the procedure followed by the Clearing Department. He stated that if the cheques were not sent from the Head Office, the Collecting Bank will presume that the cheques are honoured and the party is allowed to withdraw the amount. As per him, in the accounts of defendants No. 1 & 3, Johnson Structurals of which the defendant No.3 was a Proprietor, an amount of Rs.4,50,000/- was deposited and was substantially withdrawn in small installments. He further stated that defendant No.3 could have withdrawn Rs. 30 lakhs by opening such accounts and the said amount was deposited either by defendant No. 3 or 1. The efffect of this operation was that the monies which had not been debitted to the accounts of the drawers were credited to other accounts which means that it was the bank's money which had been paid to the accounts of the depositors, thereby putting the bank into loss. The details were placed by the said witness on record. P.W.-5, Shri Mehamod Hussain Ismail Mythaiwala was an employee of Bombay Mercantile Co-Operative Bank. P.W.-6 was an employee of Union Bank of India. Similarly Shri Pandurang Krishna Bhat of Syndicate Bank, B. A. Ulhas Pai of Vijaya Bank, Shri Koteshwar A. Kamat of Canara Bank, Shri Vaidyanath A. Narayan of Indian Overseas Bank were examined as witnesses.

6. The entire evidence both oral as well as documentary as placed on record by the Plaintiff Bank nowhere established that any amount of any transaction from any of the subject accounts was transferred to the account of defendant No.5 firm either at the instance / instances of defendants No.1, 2 & 3. The investment or capital of defendant No. 5 was not linked with withdrawals or transfers from any of these accounts under screen and as mentioned by P.W.-3. Even if the bank was defrauded by defendant No.1, in support of this claim by defendant No. 5 Firm itself was necessary for the bank to prove that investments made in the said firm were by way of money transfer from any of these accounts. Even if cash was withdrawn from any of these accounts it could not be an evidence to hold that the said amount was invested or spent. There is absolutely no evidence of this placed on record by the bank. On assesment of the evidence, the trial court held that defendant No. 4 did not have any right or title in the property of defendant No. 5 and the partnership between defendants No. 2, 3 & 4 to form defendant No. 5 was not sham or bogus or fraudulent or to cheat the plaintiffs or it had utilised funds misappropriated by defendant No. 1 from the Plaintiff Bank. Once such findings were recorded, other nine issues i.e. issues 5 to 13 could not be answered in the affirmative by the trial court unless there was specific evidence that investments on expenditure made by defendant No. 5 came from any of these accounts operated or maintained by defendants No. 1, 2 & 3 with the Plaintiff Bank or the

cash withdrawals made from such accounts were rooted through such accounts were invested in defendant No. 5 firm. The conclusions drawn by the trial court are based on presumptions and surmises. The firm by name Johnson Structurals presumerably run by defendants No. 1, 2 & 3 or any two of them was an independent entity and there was no evidence before the trial court to prove that the monies from this partnership were at any time transferred in the defendant No. 5 firm. Unless the source of investment in the defendant 5 firm was duly established it could not be accepted by the trial court that the amounts fraudulently withdrawn from the Plaintiff Bank were diverted to the business of defendant No. 5. The Plaintiff Bank utterly failed to prove its claim before the trial court which has committed manifest errors in drawing presumptions which cannot be supported by the evidence referred to above. There is no dispute that defendant No. 1 was not a partner of defendant No. 5.

7. The principle of trusteeship advanced by the trial court is not applicable at all. If the bank has been defrauded by defendant No.1 that by itself would not mean that some amount had been invested by defendant No. 1 as a benami transaction through his wife and for the activities of defendant No. 5. In the case of Valliammal (deceased by L.Rs.) v/s Subramaniam and others, 2004 AIR SCW 4948, a question whether a particular sale / transaction is a benami or not was examined. The following 6 circumstances have been held to be taken

as a guide to determine the nature of the transaction : (1) The source from which the purchase money came, (2) The nature and possession of the property, after the purchase, (3) Motive, if any, for giving the transaction a benami colour, (4) The position of the parties and the relationship, if any, between the calimant and the alleged benamidar, (5) The custody of the title deeds after the sale and (6) The conduct of the parties concerned in dealing with the property after the sale / transaction.

These circumstances are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless, the source from which the purchase money came and the motive why the property was purchased benami are by far the most important tests for determining whether the sale standing in the name of one person, is in reality for the benefit of another. In the instant case there was no evidence to show that the defendants No. 2 & 3 had invested in defendant No. 5 firm the amounts or part of any such amounts which were fraudulently withdrawn by the defendant No.1 or jointly by all these 3 defendants from the Plaintiff Bank. The suit filed by the Plaintiff Bank was perhaps by way of an after thought and just to make a cover up exercise. The trial court fell in gross errors in decreeing the suit and therefore the said decree is unsustainable.

8. In the result this Appeal succeeds and the same is hereby allowed. The impugned decree passed by the Learned Civil Judge, Senior Division at Vasco under Special Civil Suit No. 31 of 1976 on 31.10.1996 is hereby quashed and set aside and the said suit is hereby dismissed, with costs throughout.

B. H. MARLAPALLE, J.

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